It is evident that in the absence of the clause "so long as your Company shall hold any of said Bonds" in the letter agreement of January 5, 1934, the Respondent would have nothing to argue. Omitting such clause, the letter would then read in condensed form:

> "In consideration of the consent of your Company, as the holder of all of this Company's outstanding Bonds, to the execution of the Supplemental Indenture, we agree that our Company will not, without the prior written consent of your Company, pay any dividends on its capital stock or increase the salaries of its executive officers, and that the proper amount of depletion charges under the Bond Indenture shall be determined annually by agreement with your Company."

This form of covenant would appear to warrant qualification to assure (1) that the prohibition against dividends and increase in salaries should not extend beyond the life of the bonds, which were being redeemed through a sinking fund, and (2) that the privilege of giving or denying consent should not be separated from the ownership of the bonds. Both objects were met by agreeing that "our Company" should not pay any dividends without the consent of "your Company", that is, of course, "so long as your Company shall hold any of said bonds." The obvious intent of the clause was not to restrict the prohibition to the life or ownership of American, but to tie it up inextricably with the life and ownership of the bonds. The usual rules as to successors in interest would then apply.

This case involves a question which goes to the heart of the problem of proof in matters before the Tax Court. The testimony of responsible officials of *both* parties to the contract embodied in the letter of January 5, 1934, was to the effect that the phrase "your Company" therein was construed by them as including the whole enterprise represented by United, and was not limited to American.

There can be no question, nor, indeed, has any been raised, as to the credibility of this testimony, which was corroborated by the practical construction of the agreement. Nevertheless, the Tax Court refused to accept the uncontradicted testimony of the parties and chose rather to base its opinion on what it deemed to be the unambiguous language of the letter stating, "the language of the agreement of January 5, 1934, expresses only one meaning to us." The Circuit Court likewise speaks of the unambiguous purport of the phrase and states:

> "The Court will not construe a contract in conflict with the plain and accepted meaning of the language used; or add words to a contract the meaning of which is clear; or hold a covenantor beyond his undertaking."

There is here no conflict of testimony with regard to the meaning of the instant agreement. *Borin Corporation v. Commissioner,* 117 Fed. 2d 917 (CCA 6, 1941), certiorari denied, 314 U. S. 638. Accordingly there is no warrant in the record for this decision, unless, by adoption of the parol evidence rule, the uncontradicted testimony must be denied effect. This rule, however, has not been deemed to apply to a proceeding between a party to the contract and a third person, in which the contract is not the basis of the obligation but is a collateral matter. *Borin Corporation v. Commissioner,* 117 Fed. 2d 917 (CCA 6, 1941), certiorari denied, 314 U. S. 638; *American Crystal Sugar Co. v. Nicholas,* 124 Fed. 2d 477 (CCA 10, 1941); *Commissioner v. H. F. Neighbors Realty Co.,* 81 Fed. 2d 173 (CCA 6, 1936); *Indianapolis Glove Co. v. U. S.,* 96 Fed. 2d 816 (CCA 7, 1938). The Third Circuit is apparently adopting a different view which it shares with the Fifth Circuit. *Pugh et al. v. Commissioner,* 49 Fed. 2d 76; (CCA 5, 1931) certiorari denied; 284 U. S. 642.

This difference in opinion between the Circuits should be resolved, as it raises the question of paramount im-

portance in all cases involving proceedings between the Government and an individual in which the construction of an agreement made by the individual with another party is important.

CONCLUSION.

We respectfully submit that the writ prayed for should be granted.

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Appendix.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 26. Credits of corporations.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

* * *

(c) *Contracts Restricting Payment of Dividends.*

(1) *Prohibition on payment of dividends.* An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions, only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account.

* * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 26-2. *Credit in connection with contracts restricting payment of dividends.*—(a) The credit provided in section 26 (c) with respect to contracts restricting the payment of dividends is not available under every contract which might operate to restrict the payment of dividends, but only with respect to

those provisions of written contracts executed by the corporation prior to May 1, 1936, which satisfy the conditions prescribed in the Act. The charter of a corporation does not constitute a written contract executed by the corporation within the meaning of section 26 (c). The provisions recognized by the Act are of two general types, as follows:

(1) Those which come within section 26 (c) (1), in that they prohibit or limit the payment of dividends during the taxable year; and

(2) Those which come within section 26 (c) (2), in that they require the payment, or irrevocable setting aside, within the taxable year, of a specified portion of the earnings or profits of the taxable year for the discharge of a debt incurred on or before April 30, 1936.

If a corporation is restricted with respect to the payment of dividends by two or more contract provisions coming within section 26 (c) (1), only the largest of the credits computed with respect to each of such provisions, and not their sum, shall be allowable under section 26 (c) (1) and, for such purpose, if two or more credits are equal in amount, only one shall be taken into account. However, section 26 (c) (3) provides that if both section 26 (c) (1) and section 26 (c) (2) apply, only the one of such paragraphs which allows the greater credit shall be applied, and, if the credit allowable under such paragraph is the same, only one of such paragraphs shall be applied.

* * *